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Supreme Court, U.S.
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No. 91-1679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ILLINOIS COUNCIL ON LONG TERM CARE; GILMAN NURSING CENTER, an Illinois limited partnership; SPRING VALLEY NURSING CENTER, an Illinois limited partnership; and WOODSIDE MANOR, an Illinois corporation,

Petitioners,

v.

PHILLIP BRADLEY, in his official capacity as Director of the Illinois Department of Public Aid; DAWN CLARK NETSCH, in her official capacity as Comptroller of the State of Illinois; and PATRICK QUINN, in his official capacity as Treasurer of the State of Illinois,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In their Brief in Opposition to Petition for Writ of Certiorari, Respondents raise for the first time an argument based on the Spending Clause and on several decisions of this Court pertaining thereto. Respondents argue that

any condition imposed by Congress on the grant of Medicaid moneys must be unambiguous, and that, because Congress has not expressly set time limits for payments by the States under the Medicaid program, this Court may not "judicially graft a different timeframe onto the Boren Amendment. . . ." (Brief in Opposition, 13-14)

In support of this argument, Respondents cite *Suter v. Artist M.*, ____ U.S. ____, 112 S.Ct. 1360 (1992). The issue in *Suter* was whether a private right of action could be implied under the Adoption Assistance and Child Welfare Act. This Court held that it could not. This Court relied on its earlier decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981), a case also cited by Respondents, for the principle that a State had to be given unambiguous notice of the existence of a private right of action.

In *Pennhurst*, this Court considered the issue of whether the Developmentally Disabled Assistance and Bill of Rights Act created substantive and judicially enforceable rights in favor of the mentally retarded. If so, then Congress would have imposed an obligation on the States to fund those rights as a condition of receiving federal moneys under the Act. 451 U.S. 18. This Court held that Congress did not unambiguously create such substantive rights.

However, in reaching the same conclusion under the Adoptive Assistance and Child Welfare Act in *Suter*, this Court explicitly distinguished its decision in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 110 S.Ct. 2510 (1990), which held that language in the Boren Amendment to the Medicaid Act "created an enforceable right, on the part of providers seeking reimbursement, to challenge the rates set by the State as failing to meet the standards specified in the Boren Amendment." 112 S.Ct. at 1367.

In their Petition, Petitioners, relying heavily on *Wilder*, have argued that the Boren Amendment requires the States to make payments, that setting rates without paying them is meaningless, and that failure to make payments is unlawful under the Boren Amendment if as a result providers are not reasonably and adequately reimbursed. Notably, the dissent in *Suter* states that in *Wilder* "neither the majority nor the dissent found that *the right to reasonable and adequate reimbursement*" under the Boren Amendment to the Medicaid Act was too vague and amorphous to preclude enforcement by federal courts. 112 S.Ct. 1374 (emphasis added).

Respondents' attempt to conclude from *Pennhurst* and *Suter* that Congress would have had to "expressly set time limits" for Medicaid payments in order for Petitioners to succeed is clearly erroneous. In *Suter*, this Court expressly noted its *Wilder* holding that the Boren Amendment to the Medicaid Act satisfies *Pennhurst*'s requirement that a private right of action be unambiguously provided by Congress, and further noted that the private right of action belongs to providers of Medicaid services. The issue in the instant case is when the private right of action accrues, whether only if, solely for budgetary reasons, a State fails to set rates that reasonably and adequately reimburse providers, or also if the actual payments do not provide reasonable and adequate reimbursement, for which Petitioners have offered uncontroverted evidence in the instant case.

Nothing in *Pennhurst* or *Suter* requires that Congress must "expressly set time limits" in order to unambiguously require the States to reasonably and adequately reimburse providers of Medicaid services, which Petitioners maintain is already expressly required by the Boren Amendment. It is the province of the federal courts to

decide whether Congress intended that payments as actually made must reasonably and adequately reimburse providers of Medicaid services.

Respectfully submitted,

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